SUPREME COURT, U.S.
FILED
JUN 9 1995
OFFICE OF THE CLERK

No. 94-1782

In The

Supreme Court of the United States

October Term, 1994

WISTON XXIV LIMITED PARTNERSHIP,

Petitioner,

v.

BALCOR PENSION INVESTORS V,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

DONALD H. LOUDON
Counsel of Record
THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Fax: (816) 374-0509

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

No. 94-1782

In The

Supreme Court of the United States

October Term, 1994

WISTON XXIV LIMITED PARTNERSHIP,

Petitioner,

v.

BALCOR PENSION INVESTORS V,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

Respondent Balcor raises two arguments for denying certiorari. First, it claims that this case is moot because a foreclosure sale has already occurred. Second, it suggests that the Ninth Circuit's conflicting decision in *In re Arrowhead*, 42 F.3d 1306 (9th Cir. 1994), is either distinguishable or in error. Balcor's arguments do not favor denial of the petition.

Balcor offers several federal appellate decisions to support its argument that, because petitioner's property was sold at foreclosure on March 15, 1995, this case is now moot. (Resp't Br. at 6). This supposedly "well-settled

and long standing body of law" applies, says Balcor, even when the purchaser is a party to the appeal. *Id.*

The cases are not as well-settled on this point as Balcor claims. Where, as here, the party purchasing at foreclosure is effectively a party to the appeal[1], Balcor's case law is far less clear. In fact, one Circuit has recognized a specific exception to the mootness doctrine on nearly identical facts. *See In re Sun Valley Ranches, Inc.*, 823 F.2d 1373, 1375 (9th Cir. 1987) (failure to obtain stay, followed by sale of debtor's property, did not moot the debtor's subsequent appeal when the creditor-purchaser was before the court).

Should Wiston ultimately succeed on the merits of its appeal, the "sale" of Wiston's assets could still be reversed because the purchaser of the property is effectively a party to this case. Moreover, Kansas has a statutory redemption period of twelve months under K.S.A. § 60-2414(a) (1994), a factor courts have found important in holding that cases such as the present one are not moot. *See In re Sun Valley Ranches*, 823 F.2d at 1375 (exception to mootness rule "especially appropriate" where the foreclosure sale at issue was subject to statutory right of redemption).

---

[1] The property in question was purchased on March 15, 1995, by an Illinois limited partnership known as the "Villa Medici Limited Partnership." This entity has the same business address in Skokie, Illinois, the same registered agent (Balcor Registered Agent, Inc.), and the same individual signing on behalf of the general partner (Jerry M. Ogle) as respondent Balcor.

Balcor's confusing attempt to distinguish *In re Arrowhead* does not succeed. The conflict is clear: the Ninth Circuit's approach in the *Arrowhead* case would have *allowed* the present appeal, while the Tenth Circuit's approach below did not. Balcor itself essentially recognizes the conflict as it falls back to its ultimate position – that the Ninth Circuit case was wrongly decided. (Resp't Br. at 10-11). But Balcor's view on whether the Ninth or Tenth Circuit reached the wrong result is immaterial. A conflict is present, one this Court can quite easily resolve, just as it did with a similar conflict in its *per curiam* decision in *Acosta v. Louisiana Dept. of Health & Human Res.*, 478 U.S. 251, 253 (1986) (resolving in summary fashion, without briefing or oral argument, conflict over timing of appeals under Fed. R. App. P. 4(a)).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DONALD H. LOUDON
Counsel of Record
THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Fax: (816) 374-0509

Attorneys for Petitioner